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Oosterhuis, F.H.; van Asselt, H.D.; Clement, S.; Erdmenger, C.

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European policies for greener public procurement: a summary of policy recommendations

Frans Oosterhuis, Harro van Asselt, Simon Clement and Christoph Erdmenger

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IVM

Institute for Environmental Studies
Vrije Universiteit
De Boelelaan 1087
1081 HV Amsterdam
The Netherlands
Tel. ++31-20-4449 555
Fax. ++31-20-4449 553
E-mail: frans.oosterhuis@ivm.falw.vu.nl

ICLEI

Escholzstrasse 86
D – 79115 Freiburg
E-mail: ecoprocura@iclei-europe.org

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Introduction

This report contains a summary of policy recommendations to stimulate the ‘greening’ of public procurement in the European Union. These recommendations have been formulated within the framework of the ‘RELIEF’ project¹. The analysis underlying the recommendations can be found in five RELIEF papers, dealing with:

- Product policy (Oosterhuis, 2003a);
- Support for local level environmental policy (Clement and Erdmenger, 2003);
- Internal market and foreign trade policy (Oosterhuis, 2003b);
- WTO related issues (Van Asselt, 2003);
- Joint procurement and law enforcement by company complaints (Barth and Dross, 2003).

The recommendations in the present report are structured slightly differently, so as to avoid duplications and overlap. Section 1 deals with the public procurement directives, Section 2 with ecolabelling and other instruments distinguishing ‘green’ from ‘non-green’ products, Section 3 with non-legal measures at the EU level, section 4 with support for (decentral) research and networking supporting green procurement, and Section 5 with WTO related issues. A distinction is made between short term (up to 2005) and medium to long term (beyond 2005) actions. Each recommendation is accompanied by concise background information. More details can be found in the papers mentioned above, which are available from the RELIEF website (www.iclei.org/ecoprocura/relief).

This report is primarily directed to decision makers at the EU level: the Commission, the Parliament and the Council, but the recommendations may be of interest to other stakeholders as well. They have been discussed within the RELIEF project team. External experts have provided valuable comments and suggestions as well. The final responsibility for the present text, however, lies with the authors of this report.

¹ More information on the ‘RELIEF’ project can be found at www.iclei.org/ecoprocura/relief.

1. The public procurement directive(s)

Short term actions (up to 2005)

1.1: Clarify that, within the general restrictions of EU law, the technical specifications in public tenders can relate to environmentally relevant processes and production methods.

Background: The Interpretative Communication (European Commission, 2001) is far from clear as to the limits of the freedom to prescribe production processes. Apparently, the Commission did not want to choose between a narrow scope (excluding all requirements regarding production processes which are not reflected in the product itself) and a broad one (allowing any environmental requirement regarding the production process). The result is a statement ('the production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product'), which obscures rather than clarifies. However, neither the current public procurement Directives, nor the proposed new one prohibits the inclusion of processes and production methods (PPMs) in the technical specifications. Therefore, the Commission should make clear that purchasing authorities are (within the general restrictions of EU law) free to specify environmental requirements for production processes.

1.2: Prepare a reformulation of the award criterion 'most economically advantageous tender' so as to include the costs and benefits of the tender for society, and prepare guidelines for the quantification of external costs.

Under present EU procurement rules, award criteria have to serve as a means to determine the 'most economically advantageous' tender.² Although this leaves ample room for environmental criteria³, the proposed new Directive⁴ is more restrictive, by adding the phrase 'for the contracting authorities'. In addition to reducing the scope for environmental criteria, this will also cause new interpretation problems. Therefore, a reformulation is desirable. This would also be an opportunity to codify the 'additional criteria', as developed in case law. The new option could be something like 'most advantageous tender taking into account all costs and benefits for the contracting authorities and for society'. Obviously, this is a vague concept (as is the present one), and it will have to be operationalised in concrete criteria.

The advantage of including external costs would be that environmental considerations are expressed in the same unit as the 'ordinary' cost considerations, i.e. money. Obviously, there are also serious limitations to this approach, as the identification and valuation of external effects is presently still a controversial issue and the limited amount of existing estimates of external costs (such as those made in the 'ExternE' projects) are

² Ignoring here the alternative option of 'lowest price' as the single criterion for the award of a tender.

³ This was recently confirmed by the European Court of Justice in the 'Helsinki bus case'.

⁴ COM(2000)275 final/2.

characterised by large uncertainties. Further research is needed to determine if and how this idea can be put into practice.

1.3 Encourage public authorities to use the options offered by the public procurement legislation to foster innovative solutions (e.g. by means of the ‘negotiated procedure’ or design contests).

Background: Public authorities can play an important role as a ‘niche’ market for innovative, environmentally superior products and services (cf. Brander *et al.*, 2003). However, the current public procurement rules are not really suited to the need for innovative solutions, which are typically characterised by a large amount of uncertainty and risk, whereas the procurement Directives are more suited to situations where the customer exactly knows what he wants and what the specific features of the product or service are.

The proposal for a new Directive tries to solve this by enhancing the opportunities for the so-called ‘negotiated procedure’, which allows for some negotiation between the contracting authorities and the candidates. At present, this procedure is only possible in very specific situations. Under the new Directive it can also be used in case of ‘particularly complex public contracts’. Once the new Directive has entered into force, the Commission could actively draw the attention of contracting authorities to this new opportunity, so as to encourage them to use their spending power for market transformation. Other options to stimulate innovative purchasing behaviour, such as design contests, could also be actively promoted.

Medium and long term actions (beyond 2005)

1.4: Include a general clause in article 2 of the new Procurement Directive⁵, stipulating that environmental considerations should be taken into account when drawing up public tenders (at all levels of government).

Background: Article 6 of the EC Treaty states that environmental protection requirements must be integrated into the definition and implementation of other EC policies. A logical consequence would be to introduce in the public procurement Directive(s) an obligation for public authorities to take environmental considerations into account when drawing up a tender for a contract. This would make all public authorities in the EU (including the ‘not-so-green’ ones) aware of the need to take the environment into account when buying goods and services, while leaving them substantial freedom as to how to accomplish this.

1.5: Require the use of ‘full life cycle costs’ when determining the most economically advantageous tender.

Background: Obliging public purchasers to take the total life cycle of a product into account when calculating the costs of a product or service has the advantage of being a typical ‘win-win’ option. It saves the purchasing authorities money (at least in the long term) and it contributes to environmental improvement. It is particularly suited to do away with existing systems, which do not allow purchasers to take indirect, or future

⁵ COM(2000)275 final/2.

costs into account and which thus create a bias in favour of solutions with low current expenses.

1.6: Introduce, if found to be feasible, a legal obligation for every public authority in Europe with more than a certain number of employees to establish a green purchasing policy (with monitoring and reporting mechanisms).

Background: As under 3.2.

2. Ecolabelling and other instruments distinguishing ‘green’ from ‘non-green’ products

Short term actions (up to 2005)

2.1: Pay more attention in the EU’s ecolabel scheme to product groups that are of particular interest to public authorities.

Background: Currently, the EU ecolabel scheme mainly covers consumer products. In order to become a useful instrument in the greening of public procurement, its scope should be expanded to include product categories that are of interest to professional purchasers in the public sector, such as building materials and specialist equipment (e.g. for the maintenance of public space), as well as on services.

2.2: Include provisions regarding the exemplary function of public authorities in legislation relating to specific product groups, e.g. in the Directive on renewable energy.

Background: The EU’s Ecolabel Regulation already requires EU institutions and national public authorities to set an example when specifying their requirements for products, with a view to encourage the use of ecolabelled products. This example setting role could be extended to non-ecolabelled ‘green’ products and services, such as renewable energy.

2.3 Develop additional legislation for specific product groups, facilitating the distinction between ‘green’ and ‘non-green’ options.

Background: For specific product groups, which are not eligible or suitable for eco-labelling, additional legislation could facilitate the distinction between ‘green’ and ‘non-green’ products. An example is the ‘labelling’ of electricity.

Medium and long term actions (beyond 2005)

2.4: Make the use of ecolabelling criteria (and comparable schemes) in public procurement mandatory for specific product groups for which the general cost-effectiveness of using these criteria has been proven.

Background: Eco-labelling systems and other ‘official’ environmental certification schemes have the advantage of using objective and transparent criteria, which can be literally copied in the technical specifications of a call for tenders. Compliance with the criteria is easily checked in those cases where the product actually carries the label. In order to avoid inefficient spending of public money, the use of ecolabelling criteria should only be mandatory if it has been shown that they lead to substantial environmental improvement at reasonable cost.

3. Non-legislative initiatives at EU level

Short term actions (up to 2005)

3.1: Set up a Green Purchasing Working Group with the European Commission, with representatives from a variety of departments, to assist in the development of a more co-ordinated approach to supporting greener public procurement (GPP) at the European level under the Framework on Sustainable Urban Development.

Background: The Framework on Sustainable Urban Development is intended to provide the support necessary for the promotion of sustainable development at the local level. As such, the activities carried out within the Framework must provide appropriate support for the mainstreaming of green purchasing within local authorities. This will require more than the development of tools and programmes. The institutional framework also needs to be considered to provide the co-ordinated support such activities require. Such co-ordination would be greatly assisted by the creation of a ‘working group’ or similar focal point within the European Commission, bringing together representatives from a variety of departments aimed at developing an integrated approach to the promotion of GPP at the European level, and providing a direct channel of communication with others working in this field throughout Europe.

3.2: Enter into a voluntary agreement with national governments and members of the Council of European Municipalities and Regions (CEMR) to formulate and implement green purchasing policies (with clear monitoring and reporting requirements).

Background: This can be seen as one step towards the implementation of recommendation 1.6. Mindful of the proverb ‘One volunteer is worth two pressed men’, it makes sense to try to achieve significant progress in the greening of public procurement by taking voluntary measures before resorting to more binding regulations (although the latter are probably indispensable to realise the full potential of green public purchasing).

3.3: Pay due attention to the issue of environmental impact and cost-effectiveness in the Commission’s information provision on greener public procurement (such as the envisaged Handbook and the product information database).

Background: Current systems giving information on the environmental features of products, such as ecolabels, generally do not provide guidance on the size of environmental improvement that can be achieved by choosing a particular option. Although it seems unlikely that it will ever be possible to obtain reliable information to determine the environmental impact (and hence the cost-effectiveness) of all procurement decisions, it would be desirable that all information that is available should be used. To this end, the EU’s own information sources on greener public procurement should give due attention to the issue of environmental impact and cost-effectiveness. This implies, among others, that a distinction has to be made between situations where the environmental benefits of ‘buying green’ are reasonably certain and independent from specific circumstances (in such cases, it can be generally recommended or even be made obliga-

tory) and situations where these benefits are uncertain and/or dependent on specific circumstances (in such cases, additional analysis may be needed before taking a decision).

3.4 Provide incentives to research and industry for the development of new products and services meeting (latent) ‘green demand’ by public authorities.

Background: Green public procurement does not only entail buying the ‘greenest’ products that are readily available on the market, but also stimulating the development of innovative products and services that meet the needs of public purchasers. This can be stimulated by means of ‘traditional’ R&D support, but less conventional instruments could also be taken into consideration. Examples include prizes and awards, as well as (to the extent that competition law allows it) preferential treatment and partnerships between government and industry.

3.5: Impose requirements on the European standardisation organisations to include environmental considerations in their work.

Background: EU procurement legislation requires that public tenders should refer to European standards whenever they exist. Therefore, it is extremely important that standardisation organisations such as CEN are obliged to take environmental considerations into account when formulating or revising product standards.

3.6: Explore possible product groups for which particular obligatory instruments could be used (such as mandatory use of ecolabelling criteria, quantitative targets or price preferences).

Background: There are various ways of giving green public procurement a more obligatory character than is presently the case. These include, among others, the mandatory use of ecolabelling criteria in public tenders (cf. Recommendation 2.4), quantitative targets (e.g., x% market share of certain ‘green’ products in public purchasing in a given year) or price preferences (allowing or requiring to buy a ‘green’ product even if its price is higher than that of the ‘non-green’ alternative). The cost-effectiveness of these types of measures will often depend on the specific product group and other specific conditions. The proposed study should reveal what product groups are especially suited to these approaches and under what conditions.

Medium and long term actions (beyond 2005)

3.7: Formulate policies addressing the (perceived) legal obstacles to greener public purchasing

Background: The findings from the RELIEF project show that at least for part of the public authorities in the EU the lack of transparency of legal rules may be an obstacle to the further development of green public procurement.

4. Research and networking

Short term actions (up to 2005)

4.1: Carry out a study on the possible role of quantitative information on the environmental benefits of greener procurement in cases where a balance has to be struck between conflicting principles of EU policy.

Background: Incorporating environmental criteria in public procurement may sometimes cause an internal conflict between principles of EU law (e.g. the internal market and the environmental protection principles of the EC Treaty), especially if the criteria concern processes and production methods that do not affect the product as such. In such cases, guidance is needed on the considerations to be applied in striking a balance. It could be worthwhile to study the question whether quantitative information on the environmental benefits of greener public procurement (such as developed in the RELIEF project) could play a role in finding that balance.

4.2: Support National Green Purchasing Programmes, including the preparation of model statements, the provision of information resources, and training courses and capacity building activities.

Background: All EU member states have committed themselves to green procurement, not only by adopting the 6th environmental action programme but also through various OECD resolutions and the Johannesburg documents. The EU should take a leading role in supporting the member states in starting or improving their current national programmes. This could also happen in the context of a debate about revising the EU procurement legislation making it obligatory to consider environmental criteria in procurement (see recommendation 1.4).

4.3: Support the setting up of National Green Purchasing Focal Points to assist in the monitoring and promotion of Greener Public Procurement (GPP) at the national level, and the dissemination of information. A financial contribution should also be provided for monitoring tasks.

Background: The institutional support framework for GPP in Europe is currently relatively weak. National Green Purchasing Focal Points (not necessarily new institutions, they could be established by existing bodies) could play a key role in assisting in the collection of green purchasing data within that country, and ensuring the comparability of data at the European level. Furthermore they could play a significant role in promotion and the dissemination of information across Europe. A knowledgeable institution working at the national level, would provide an excellent conduit for collected European expertise and advice, in addition to activities designed to promote the uptake of green purchasing practices, and participation in monitoring activities

4.4: Provide a broader source of funding to pursue the goal of sustainable urban development, specifically recognising GPP as a target area for proposals, and providing support for international networking activities.

Background: Not all the activities presented under 4.2 and 4.3 would have to be carried out by the European Commission, but could very well be subject to third-party projects co-financed by the EU. Apart from activities on the Member State level to be triggered, local authority networks and NGOs could provide valuable support.

Such activities would clearly require significant funding. To date, within the Framework on Sustainable Urban Development, one funding source is available, aimed at existing networks of local authorities. The funding available at present is, however, neither large nor clearly related to green purchasing. There is a need for a broader source of funding to pursue the goal of sustainable urban development, which should specifically recognise green purchasing as a target area for proposals, and provide support for the promotion of international networking activities.

4.5: Promote the use of the hurdles self-evaluation tool developed by the Technical University of Dresden at the European level, in co-ordination with the above recommendations.

Background: In addition to providing the appropriate policy and institutional framework, and practical tools and assistance, the successful implementation of green purchasing measures at the local level is also dependent on the successful identification and removal of further local barriers, which may vary considerably from authority to authority. Within the RELIEF project a self-evaluation tool has been developed by the Technical University of Dresden⁶ aimed at identifying and preparing strategies to overcome these hurdles.

Such a tool would provide significant assistance for those authorities wishing to or already carrying out green purchasing activities, however advanced these might be. As such it is recommended here that this tool be widely promoted for all public authorities across the EU (not just local authorities). This could be incorporated into the promotion of National Green Purchasing Programmes as outlined above, and further disseminated by the National Green Purchasing Focal Points.

4.6: Review the existing European Common Indicators initiative, particularly indicator 10: "Products promoting sustainability". Aim to improve the ease of data collection and data comparability through a well-defined list of product groups, a clear indicator of what a "green" product is, and developing a uniform reporting tool.

Background: The ECI initiative, if introduced effectively, could provide an element of support as a useful tool for monitoring progress, but a number of weaknesses exist in the current scheme, particularly in relation to Indicator 10: "Products promoting sustainability". Effective data collection requires two key factors: ease of collection, and comparability of data. The current system, which gives a wide degree of leeway for local authorities to decide on what to report, does not provide the necessary comparability, and makes assistance with data collection that much harder. A workable system would require both a clearly defined list of product groups to be researched, and a clear definition of what a

⁶ For more information on this tool please visit the RELIEF website at www.iclei.org/ecoprocura/relief or contact the author Edeltraud Günther directly at bu@mailbox.tu-dresden.de

"green" product is. An effective solution would be to use the product groups and definitions identified during the RELIEF project.

Medium and long term actions (beyond 2005)

4.7: Examine the possibilities of adapting the current EMAS scheme to include an element of political priority setting, and the inclusion of obligatory elements such as sustainable consumption. Also look to incorporate other actors in the community, e.g. hospitals, and investigate the setting up of a less comprehensive, more targeted (and therefore more affordable) scheme: an "EMAS light".

Background: At the level of implementation, the recent EMAS extension and recommendations provide a welcome degree of support for green purchasing in local authorities. However, the resource intensive nature of the existing scheme has somewhat limited its uptake, with currently only around 90 local authorities registered across Europe. To address this problem it is recommended that the setting up of some form of EMAS "light", which would involve a less comprehensive, more targeted approach be re-searched.

A number of other adaptations should also be considered for the current scheme, including the possibility of linking it to some form of political priority setting process, e.g. by accompanying the scheme by political environmental management systems such as *ecoBudget*.⁷ Furthermore, although GPP is highlighted as a possible tool for achieving self-set EMAS objectives, there is no obligation on EMAS registered local authorities to implement any measures aimed at sustainable consumption. A requirement should be made that green purchasing is not only a possible, but also an obligatory element for achieving certification.

4.8 Stimulate suppliers of 'greener' products to contribute to the enforcement of the requirement to include environmental considerations in public tenders, by legally challenging procurement decisions where such considerations have been neglected.

Background: An analysis of the legal situation in Germany and the UK shows that the use of legal action to further green public procurement seems a promising approach. However, a legal basis is needed. An obligation for public authorities to include relevant environmental criteria into a tender where possible would give suppliers the possibility to insist that their environmentally friendly product be purchased by public authorities.

⁷ For more information on *ecoBudget* see <http://www.iclei.org/europe/ecobudget>.

5. WTO related issues

5.1: Put the issue of the greening of government procurement on the agenda of the WTO negotiations by, for instance, linking the negotiations following the Doha Declaration on transparency in government procurement and on environmental issues in order to start a debate on green government procurement within the WTO.

Background: Currently, none of the items on the agenda of the WTO's Committee on Trade and Environment (CTE) specifically addresses green public procurement. The Doha Declaration called for further negotiations on labelling schemes for environmental purposes as well as for negotiations on Transparency in Government Procurement. In one of these negotiations, the link between eco-labelling (in particular, labelling involving non-product related processes and production methods) and procurement could be made, which might lead to a more substantial debate than has been going on until now.

5.2: Undertake an environmental review of the GPA or include a review of the GPA in an environmental review of the entire WTO.

Background: The CTE has encouraged WTO members to undertake environmental reviews of trade agreements on a voluntary basis. This practice has been reflected in the Doha Declaration, which encourages members to share expertise and experience with other members in order to perform environmental reviews at the national level. An environmental review of the Agreement on Government Procurement (GPA) could be helpful in pinpointing possible conflicts between the GPA and the greening of public procurement. Until now, no such review has been conducted.

5.3: Suggest in discussions on government procurement that the exception of the GPA should also accommodate the environmental exception of Article XX (g) GATT.

Background: Both the General Agreement on Tariffs and Trade (GATT) and the GPA contain general exceptions, through which violations of provisions of the respective agreements can be justified. Article XX (b) of the GATT and Article XXIII (2) of the GPA state that measures necessary to protect human, animal or plant life or health are allowed, provided that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. In addition, Article XX (g) of the GATT provides for an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It is not clear why the GPA does not contain a similar clause. If it would be inserted, there could arguably be more opportunities to invoke the exception for procurement measures based on environmental considerations.

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